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IN THE

Supreme Court of the United States

October Term, 1953
No. .....

JOSEPH L. MCCLELLAN, as Trustee in Bankruptcy of the Estate of CAPITAL GAS CORPORATION, a bankrupt corporation, CAPITAL GAS CORPORATION, a corporation, and JOHN WIGHT,

Petitioners,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Petitioners, Joseph L. McClellan, as Trustee in Bankruptcy of the Estate of Capital Gas Corporation, a bankrupt corporation, Capital Gas Corporation, a corporation, and John Wight, (for convenience hereafter the Capital Gas Corporation will be referred to as the petitioner) pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Eighth Circuit made on May 8, 1953, which judgment and order affirmed the judgment of the United States District Court for the District of Minnesota and which court granted a motion for summary judgment and dismissed the action.

Opinions Below.

The opinion of the Court of Appeals is reported in 204 F. 2d 166 and the opinion of the trial court is reported in 104 Fed. Supp. 46. (The first trial court opinion is reported in 95 Fed Supp. 977.)

Jurisdiction.

The judgment of the Court of Appeals was entered on May 8, 1953 [Ct. of App. R. 11]. The jurisdiction is invoked under 28 U. S. C. A., Section 1254(1). No petition for rehearing was filed because Rule 15(c) of Rules of United States Court of Appeals for the Eighth Circuit, provides that, "The sole purpose of a petition for rehearing is to call attention to material matters of law or fact inadvertently overlooked by the court, as shown by its opinion. Mere reargument of issues determined by the opinion will be disregarded." While petitioner disagrees with the conclusions of that court, petitioner could not urge that the court had inadvertently overlooked any law or fact.

Questions Presented.

The main question presented on this appeal is whether a common carrier natural gas pipeline company can avoid liability for the damages it caused a producer (petitioner) of natural gas who desired to ship gas over the common carrier pipeline system and sell it to commercial and industrial users but was prevented from doing so by the pipeline company because it, first, denied it was and refused to act as a common carrier, and, second, upon enactment of the Natural Gas Act on June 21, 1938, filed with the Federal Power Commission a purported rate for transportation of natural gas but which rate would have required the shipper to have paid twice as much for

transportation of gas as the pipeline company was producing, transporting and selling gas for with the result that no gas could be shipped. Another potential shipper of gas on December 6, 1941, filed a complaint with the Federal Power Commission alleging that the rate on file was unreasonable and unlawful and the pipeline company pleaded that it was not a common carrier and claimed that it had no rate on file. On July 7, 1942, the Federal Power Commission on its own motion filed a petition against the pipeline company to investigate lawfulness of rates and conduct of the pipeline company which was joined for hearing with the other complaint. Your petitioner was not directly a party to those proceedings. The Federal Power Commission determined the rates were unlawful and those proceedings were pending until October 25, 1948; thereafter, pursuant to the affirmed order of the Federal Power Commission the respondent pipeline company on April 2, 1949, filed for the first time a lawful rate for the transportation of gas. On June 7, 1943, during the pendency of those proceedings, your petitioner went bankrupt. Most of the gas wells and gas lands owned by the petitioner are now under the ownership or control of the pipeline company. Petitioner's action was one for the damages it sustained as a result of the unlawful acts of the pipeline company.

(Questions)

1. Did the pipeline company's conduct constitute a violation of the Sherman Antitrust Laws and give rise to a civil damage action in favor of the shipper for the damage it was caused? (Lower court said no.)

2. Was the Minnesota six-year statute of limitations tolled during the pendency of the Federal Power Commission proceeding? (Lower court said no.)

3. In the Sherman Antitrust action in order to recover damages, for example, of the value of a gas well or gas producing lands, was it a condition precedent before such damages could be proved that the Federal Power Commission would have to determine what a reasonable rate would have been during the period that the unlawful rate was on file. (Lower court said yes.) (Because Petitioner's action was not one for reparations, Petitioner contends such a determination wholly unnecessary.)

4. Is difficulty of proof of damage which the pipeline company's unlawful and wrongful acts have caused any reason to dismiss the damage action? (Lower court held plaintiff could not prove damages.)

5. Is it necessary for an intended shipper of natural gas over a common carrier natural gas pipeline to obtain a certificate of convenience and necessity when it intends to sell the gas to commercial and industrial users and does not sell the gas for intended resale? (Lower court said yes.)

Statutes Involved.

Section 28 of the Leasing Act, 30 U. S. C. A. 185;

Natural Gas Act, Section 2, 15 U. S. C. A. 717a (6);

Section 4, 15 U. S. C. A. 717c(a)(c);

Section 7(c), 15 U. S. C. A. 717f (c);

Section 22, 15 U. S. C. A. 717u;

Antitrust Laws, 15 U. S. C. 1, 2, 3, 4, 7, 12, 15;

Minnesota Statutes Annotated, Section 541.05.

Said statutes are printed in Appendix A, *infra,* pages 1-6.

Statement of Facts.

The complaint was filed in the United States District Court of Minnesota, Minneapolis Division, on October 25, 1950. The claim was for damages arising out of alleged breach by the respondent, a natural gas common carrier pipeline company, of the Leasing Act, the Natural Gas Act and the Sherman Antitrust Laws. The complaint was filed by the trustee in bankruptcy of the Capital Gas Corporation, Capital Gas Corporation and John Wight. The principal plaintiff is the Capital Gas Corporation and for convenience it will be referred to as the petitioner.

The following is found in the complaint [R. 1-15]:

Petitioner, a Montana corporation, owned or controlled from 1930 until 1940 lands in Montana which were capable of producing 66 million cubic feet of gas per day. It actually drilled or caused to be drilled 13 gas producing wells which were lost between 1939 and 1944 and these wells for the most part are now owned by the respondent. From 1930 until its bankruptcy in 1943, petitioner desired to ship gas over respondent's common carrier pipeline. Respondent during the entire period denied it was a common carrier and refused to transport any gas for petitioner and had a purported transportation rate that would have required petitioner to pay respondent 65 cents per thousand cubic feet while respondent itself was selling gas to industrial and commercial customers at 30 cents or less per thousand cubic feet.

By reason of the provisions of the Leasing Act of February 25, 1920, 30 U. S. C. A. 185, and regulations thereunder, and also by reasons of its agreement with the Secretary of the Interior, dated December 17, 1934, re-

spondent was obligated to operate and maintain its gas pipeline as a common carrier. Because of respondent's refusal to transport gas, and because of the demand for the aforementioned unreasonable rate, petitioner could not sell its gas and was thereby deprived of any revenue from which to pay the royalties on its leases, gas wells, and production contracts.

In an effort to require respondent to comply with the law, petitioner caused a proceeding to be instituted before the Department of the Interior and that Department held in 1935 that respondent's demanded rate, denominated 3-G, which is the rate above mentioned, was unlawful and discriminatory and that Department held that respondent had failed to comply with its common carrier obligations. Respondent successfully contended before the Secretary of the Interior that it had no right to promulgate a new rate and that respondent's jurisdictional objection on that ground was well founded. On March 2, 1937, respondent issued a new purported rate, for convenience referred to as 4-G. This tariff was just as unreasonable as the previous tariff 3-G.

The Natural Gas Act, 15 U. S. C. A. 717, became law on June 21, 1938, and the Federal Power Commission was then set up as the administrative agency to administer common carrier natural gas pipelines. Respondent filed with the Federal Power Commission said rates 3-G and 4-G.

On August 29, 1939, petitioner filed a complaint with the Federal Power Commission alleging that respondent's rate 4-G was unreasonable and discriminatory. Through economic coercion as alleged in the complaint and threatening petitioner with bankruptcy, respondent was instrumental in having petitioner withdraw that complaint and

the same was dismissed without prejudice. At the same time respondent procured a release which petitioner alleges is contrary to public policy and void and the same was obtained under duress and by the terms of which respondent required petitioner not to contend that respondent was a common carrier. [Supplemental R. 1, 2, 3.]

On December 6, 1941, a complaint was filed with the Federal Power Commission by another corporation charging that respondent's demanded rates (3-G and 4-G) were unreasonable, discriminatory and unlawful and thereafter on July 7, 1942, the Federal Power Commission commenced a separate proceeding of its own to investigate and determine whether respondent's rates (3-G and 4-G) were unjust and unlawful or not. The Federal Power Commission proceeding was consolidated for hearing with the December 6, 1941, complaint. In those proceedings respondent pleaded that it was not a common carrier and claimed it had no rate schedules on file. However, the Federal Power Commission found contrary to respondent's contention and determined that respondent's rates (3-G and 4-G) were unduly discriminatory and unlawful and also determined that respondent at all times since construction of its pipeline is and had been a statutory common carrier of natural gas and as such required to accept gas from shippers of gas in interstate commerce for transportation through its pipeline at a non-discriminatory rate. That proceeding was not finally adjudicated and determined until October 25, 1948, when the Supreme Court of the United States denied respondent's petition for writ of certiorari, 335 U. S. 853, and the decision of the Federal Power Commission was affirmed by the United States Court of Appeals for the Eighth Circuit on August 4, 1948. That decision is reported in 169

F. 2d 392. On April 2, 1949, for the first time respondent filed a non-discriminatory rate for transportation of gas through its pipeline.

While those proceedings were pending petitioner went bankrupt on June 7, 1943. Petitioner claims that as a direct result of respondent's unlawful acts, petitioner lost all of its assets that had a reasonable value of 3 million dollars. (Part of those lands are now worth many millions by reason of the Williston Basin oil discovery.) Said assets consisted of gas producing lands and wells, leases and operating agreements on gas producing lands in the vicinity of respondent's pipeline. Petitioner also contends that respondent's unlawful acts prevented it from engaging in interstate commerce, that is, from producing and shipping natural gas produced in the vicinity of respondent's pipeline and selling said gas to commercial and industrial users in North and South Dakota. This gas was not to be resold but was to be used by commercial and industrial customers. Petitioner alleges that during that period and continuously until April 2, 1949, had it not been for respondent's wrongful acts, petitioner could have produced, shipped and sold in interstate commerce not less than 40 million cubic feet of gas per day and that there were customers and a market then available therefor and that respondent's pipeline and facilities were adequate to transport such gas. By reason thereof petitioner claims it was damaged by respondent in the sum of 10 million dollars.

Petitioner thus claims that respondent's conduct, which was continuous from January 1, 1930, until April 2, 1949, violated the Sherman Antitrust Act and that petitioner was a person injured by reason of such violation and that in accordance with the provisions of the Anti-

trust Laws petitioner was entitled to treble damages and attorney fees. Petitioner also claimed that respondent's acts and conduct were in violation of the Leasing Act, of the agreement of respondent with the Secretary of the Interior, and the Natural Gas Act, 15 U. S. C. A. 717.

Petitioner further alleged that it had no remedy against respondent until it was ultimately determined by the Federal Power Commission that respondent's demanded rates 3-G and 4-G were unlawful and which determination did not become final until on or about April 2, 1949, when respondent filed a lawful rate.

It was further alleged that the proceedings before the Federal Power Commission were for the benefit of the public generally and that petitioner was entitled to the benefit of those proceedings and findings although not directly a party thereto.

The respondent filed a notice of motion to dismiss the complaint and the trial court filed a written order denying this motion, which opinion is reported in 95 Fed. Supp. 977 [R. 19-23].

Respondent filed a written answer and admitted that its pipeline was a common carrier and denied many of the other allegations of the complaint. However, it admitted that after June 21, 1938, petitioner had no common law right or remedy after the effective date of the Natural Gas Act [R. 26]. Respondent by its answer admitted that the Federal Power Commission found that the only rate schedules it had on file were unlawful and that it filed a new rate on or about April 2, 1949 [R. 27-28]. Respondent further pleaded the statute of limitations, laches and pleaded that petitioner had failed to obtain a

certificate of public convenience and necessity from the Federal Power Commission.

After the answer was filed, interrogatories and cross-interrogatories were requested and answered by both petitioner and respondent. Depositions were taken. *There was no trial of this action.* It was dismissed on a motion for summary judgment made by respondent. The motion and opposition to the motion were argued extensively on May 14, 1951. During the course of the argument the trial court announced that it did not "take any stock" in the contention of petitioner that respondent acted fraudulently, disobeyed the law and refused to be a common carrier and the trial court stated during the course of the argument on the motion for summary judgment, "I don't take any stock in this. The law imposed upon them the duty of a common carrier and I am certain that they recognize it and have recognized it" [R. 209]. Of course, the foregoing conclusion of the trial court was directly contrary to and at variance with respondent's own admissions, directly at variance with the facts and directly at variance with what was adjudicated in the proceedings before the Federal Power Commission and determined by the Court of Appeals for the Eighth Circuit in the case of *Montana-Dakota Utilities Co. v. Federal Power Commission,* 169 F. 2d 392 (C. A. 8).

The matter was then submitted and thereafter on March 5, 1952, a written memorandum of order of the District Court was filed sustaining the motion of respondent for summary judgment. This written memorandum is set forth in the record, pages 210 to 227, and is in substance and effect a reversal of the previous decision of the trial court rendered at the time it denied the respondent's motion to dismiss [R. 19-23 incl.].

Petitioner took an appeal and the Court of Appeals affirmed the judgment of the trial court, principally on the ground that the cause of action was barred by the six-year statute of limitations of the State of Minnesota but further stated, "We agree with the conclusions of the trial court in its opinion reported in 104 Fed. Supp. 46."

Specification of Error to Be Urged.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that the statute of limitations barred the action.

2. In agreeing with the conclusions of the trial court reported in 104 Fed. Supp. 46.

Reasons for Granting the Writ.

This is a case of first impression before the United States Supreme Court and is one of national import in that it affects all persons who desire to ship natural gas over a common carrier gas pipeline and affects all producers of gas and all consumers of gas who desire a competitive market in the production and sale of natural gas.

If the decision of the trial court, as affirmed by the Court of Appeals for the Eighth Circuit, stands as the law, all a common carrier natural gas pipeline company has to do to evade its obligation to transport gas as a common carrier and obtain an unlawful monopoly on the production, transportation and sale of gas is to do what respondent did here *without fear of liability for so doing*, that is, file a purported transportation tariff with the Federal Power Commission that is so high and unreasonable

that no shipper could use it because a shipper would have to pay twice as much for the transportation charges alone as the pipeline company itself sells gas for. The shipper thus cannot use the rate because it cannot sell without net loss. Therefore, it cannot seek any reparations and it has no cause of action in the United States District Court for damages until the Federal Power Commission administratively determines that the filed rate is unreasonable and unlawful. The Natural Gas Act does not provide any damage remedy before the Federal Power Commission. The pipeline company knows that the proceedings before the Federal Power Commission are slow and drawn out. In this case, for example, the complaint was filed with the Federal Power Commission on December 6, 1941, challenging the rates and the final judicial act was made on October 25, 1948, and finally a lawful rate fixed by the Federal Power Commission was filed on April 2, 1949. In the meantime, the shipper and producer cannot market its gas and by the very nature of gas wells, gas leases and gas purchase contracts the same are cancelled because royalties are not paid. The only market then available is that offered by the gas pipeline company. Thus as a result of its unlawful conduct it acquires all of the gas purchase contracts and gas leases and the shipper, as petitioner did, goes bankrupt, and has no remedy.

Although the decision of the Court of Appeals is based primarily on the statute of limitations barring the action, several basic legal questions are presented which were necessarily determined by the trial court and the Court of Appeals adversely to legal principles which have been well-established by the United States Supreme Court and other Courts of Appeal.

A. Thus the decision is in conflict with the following:

1. Until the Federal Power Commission determined the administrative question that the rate on file was unlawful petitioner could maintain no cause of action in the United States District Court.

Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304;

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 406;

Montana-Dakota Utilities Co. v. Northwestern Public Services Co., 341 U. S. 246.

2. Even though petitioner was not a direct party to the Federal Power Commission proceeding it was entitled to the benefit of that proceeding because it was for the benefit of the public, that is, all shippers of gas and the statute of limitations was *tolled* while that proceeding was pending.

National Pole Co. v. Chicago & N. W. Ry. Co., 211 Fed. 65 (C. A. 7).

3. When proof of damages is made difficult and uncertain by the wrongful act of respondent, respondent cannot complain because the damages cannot be measured with exactness and precision.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 at 563;

Thomsen v. Cayser, 243 U. S. 66;

Bigelow v. R.K.O. Pictures, 327 U. S. 251;

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390;

Package Closure Corporation v. Sealright Co., 141 F. 2d 972 at 979 (C. A. 2).

4. The conduct of respondent was in violation of the provisions of the Sherman Antitrust Act.

United States v. Trans-Missouri Freight Association, 166 U. S. 290;

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555;

S. S. W., Inc. v. Air Transport Assn. of America, 191 F. 2d 658 (C. A., Dist. of Col.).

In re American Fuel & Power Co., 122 F. 2d 223 (C. A. 6).

B. The lower court decision decided a question of first impression of great importance but contrary to the statute.

Petitioner is not a "natural gas company" under the definition of the Natural Gas Act, 15 U. S. C. A. 717a(6), that is, petitioner is not engaged in transportation of natural gas in interstate commerce (that was respondent's status) and petitioner did not intend to sell gas in interstate commerce *for resale.* Nevertheless, the Court of Appeals in agreeing with the conclusions of the trial court, reported in 104 Fed. Supp. 46, thus decided that a shipper such as petitioner would have to obtain a certificate of public convenience and necessity from the Federal Power Commission under Section 7(c) (15 U. S. C. A. 717f(c)), of the Natural Gas Act. The Natural Gas Act does not so require and that question, important to all shippers of natural gas, should be settled by the Supreme Court of the United States.

C. The Court of Appeals' decision erroneously applies the decision rendered by the Supreme Court in *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.,* 341 U. S. 246, as an authority sustaining the view that respondent is not liable in damages, notwithstanding its

unlawful conduct. To so apply that decision to the facts of this case results in a travesty of justice and violates the basic principle that for every wrong there is a remedy.

Discussion of Foregoing Reasons.

1. The trial court and the Court of Appeals could only have concluded that the six-year statute of limitations barred the action by holding that the proceedings before the Federal Power Commission were unnecessary so far as the damage action is concerned. Any damages petitioner sustained after June 21, 1938, after the Natural Gas Act became law, based on an unlawful transportation rate respondent had on file with the Federal Power Commission, could only be brought after the Federal Power Commission had determined the administrative question that the rates respondent had on file were unlawful. That rule is well established.

> *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 406.

In *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304 at 311, it is said: "the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

Even though petitioner was not a direct party to the Federal Power Commission proceedings, it was entitled to its benefit. So held in *National Pole Co. v. Chicago & N. W. Ry. Co.*, 211 Fed. 65 at 72, 73. There the court said:

> "* * * where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore pro-

hibited. In such cases the whole scope of the statute shows that it was intended *that the commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice* * * * since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, *the plaintiff must, as a condition of his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal* and prohibited * * *."

The statute of limitations was tolled from December 6, 1941, until, at least, October 25, 1948, when the United States Supreme Court denied the writ of certiorari. The action was filed October 25, 1950. Petitioner was entitled to the six-year statute of limitations. Minnesota Statutes, Section 541.05. The Court of Appeals so held [Ct. of Appeals R. 9].

Of the six-year statute there was thus four years left and the statute did not apply from December 6, 1941, until October 25, 1950. Any cause of action petitioner had for damages for four years prior to December 6, 1941, that is, since December 6, 1937, was not barred. It was after December 6, 1937, that petitioner lost many of its assets. For example, it was thereafter that it lost ownership and control of 12 gas wells [R. 152-154] and petitioner did not go bankrupt until June 7, 1943. The trial court (whose reasoning was approved by the Court of Appeals) held, "that there was nothing the Commission could or did do to affect any action the

plaintiff might desire to assert for damages suffered in the past" [R. 225], and thus concluded that the statute of limitations was not tolled by those proceedings. Of course, that conclusion ignores the well-established principles above referred to. It was only after the Federal Power Commission found (finally affirmed on August 25, 1948), that respondent's demanded rate was unlawful that petitioner could state a cause of action based thereon.

2. The trial court as well as the Court of Appeals by fallacious reasoning assume that because the Federal Power Commission has no jurisdiction to determine what a reasonable rate should have been when the unlawful rate was on file that petitioner could not prove any damages. The fallacy arises apparently out of the failure of the trial court in its last opinion, at least, and the Court of Appeals to recognize the difference between a reparations case and the instant case. The trial court properly recognized that distinction in its *original opinion* when it denied the motion to dismiss when it said:

> "The Keogh case did involve an action by a shipper to recover damages under Section 7 of the Anti-Trust Act, and the court held that the shipper had no such right of action. However, as Justice Brandeis pointed out, Sections 9 and 16 of the Act to Regulate Commerce afforded plaintiff two means for recovering damages arising out of the payment of unreasonably high rates and concluded that Congress could not be presumed to have intended the Anti-Trust Act to afford plaintiff an additional remedy. ***The situation in the present case is different.*** First, the Natural Gas Act does not afford plaintiff any remedies for the recovery of damages; secondly, ***plaintiffs do not seek to recover damages as measured by the difference between what plaintiffs***

> *paid and what they should have been required to pay.* Plaintiffs allege that defendant's restraint on trade was so effective that they were prevented from doing *any* shipping or paying *any* rates. I believe, therefore, *that the situation is materially different in the present case,* and outside the holding in the Keogh case." [95 Fed. Supp. 977; R. 22.]

Then in its second opinion (approved by the Court of Appeals) when it granted the motion for summary judgment the trial court ignored the distinction between the instant case and a reparations case and said:

> "My only conclusion is that plaintiff here is in no better position for having secured the Commission's determination that defendant's rates are unlawful, and that the attempt to characterize the suit as an anti-trust action does not surmount or avoid the difficulties heretofore pointed out. Keogh v. C. & N. W. Ry. Co., 260 U. S. 156." [R. 222.]

All petitioner needed of the Federal Power Commission was its administrative holding that the rates respondent had on file during the time in question were unlawful. That has been adjudicated.

Montana-Dakota Utilities Co. v. Federal Power Commission, 169 F. 2d 392 (C. A. 8).

Certainly in order to show and prove what a gas well or a gas lease or a gas producing land is worth, it does not require any administrative determination as to what a lawful rate would have been during the period respondent was violating the law. For that matter the trial court or jury in an order to fix and approximate the damages petitioner was entitled to, could do so by relevant data and render its verdict accordingly.

Bigelow v. R.K.O. Pictures, 327 U. S. 251.

The mere fact that petitioner might have difficulty in proving its damages with exactness and precision is no reason to dismiss the action and certainly the respondent, whose unlawful acts caused the difficulty, cannot complain on that ground. In *Package Closure Corporation v. Sealright Co.*, 141 F. 2d 972, at 979 (C. A. 2), it is said:

> "* * * there is no insufficiency in the allegations as to loss of prospective profits. As the Supreme Court observed in *Story Parchment, supra,* when a wrongdoer is alone responsible for creating a condition in which damages cannot be measured with exactness and precision, he cannot complain. The court said: 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.'
>
> "That doctrine finds its application in many differing contexts. *Often, a failure to apply that doctrine would mean that the more grievous the wrong done to the plaintiff by the defendant, the less likelihood there would be of a recovery.* In the *Story Parchment* case the court (282 U. S. at page 565, 51 S. Ct. at page 251, 75 L. ed. 544) quoted with approval from *Strauss v. Victor Talking Machine Co.*, 2 Cir.,

297 F. 791, 802, to the effect that 'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' "

3. Both the trial court and the Court of Appeals referred to *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.*, 341 U. S. 246, as some authority in support of the dismissal of petitioner's action. That decision cannot be so applied. In that action plaintiff was seeking *reparations* and had failed to first have an administrative determination that the rate was unlawful, and also, as pointed out at page 254 of that decision, there was no equity in favor of the plaintiff in that action because it was attempting to recoup by way of reparations what it had already recouped from the public and there was no machinery in or out of court by which the public could be repaid. It is at once apparent that decision has no application here, first, because petitioner's action is not one for reparations, second, there has already been an administrative adjudication that the rate demanded was unlawful, and lastly, there is a great deal of equity in favor of petitioner here, whereas there was none in favor of plaintiff in that other case. The decision of the Court of Appeals should not remain as the law construing that decision as blocking a damage action of the kind here involved. Certainly the mere fact that the Federal Power Commission has no authority to fix past rates does not preclude petitioner from proving damages when it has been established that respondent by its unlawful acts caused petitioner damage. It does not make any difference what a lawful rate might have been during that period, it was the unlawful rate that caused the damage.

In this kind of a case petitioner's damage is not the difference between some rate that should have been charged and which was never paid and the rate claimed, but its damage is the reasonable value of gas wells, gas lands and the gas that could have been produced therefrom. What relevancy has any reasonable rate that was never charged or paid have to do with proving such an item of damage.

The foregoing illustrates the fallacy of the trial court's decision and the opinion of the Court of Appeals affirming it.

4. No certificate of convenience and necessity was required of petitioner. The trial court's decision approved by the Court of Appeals held that petitioner could state no cause of action because it had no certificate of convenience and necessity from the Federal Power Commission.

Until respondent filed a usable rate petitioner should not be required to apply for any allocation of pipe-line space or any certificate from the Federal Power Commission until it knew that it could do so at least without net loss. Petitioner went bankrupt before a lawful rate was filed. The Federal Power Commission in its opinion referred to that situation as a vicious circle out of which a shipper could not successfully break. It held that a common carrier has no right to demand that goods be actually brought and presented to it for shipment before it fixes and publishes a rate and that a shipper of gas could not afford to incur the expense to connect up and tender gas for transportation until it was assured by the filing of a reasonable rate that it could sell and distribute gas to its customers at least without net loss [R. 90-91].

That same reasoning, of course, applies to requesting the Secretary of the Interior to allocate pipe-line space.

In view of respondent's unlawful acts and attitude, it would have been an idle act for petitioner to have so done. "The law does not require an idle act."

Furthermore, under the provisions the Natural Gas Act petitioner was not a "natural gas company." 15 U. S. C. A., Section 717a(6), provides:

> "Natural gas company means a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Of course, petitioner was not the pipe-line company. *Respondent* was the *person engaged in the transportation of gas* and petitioner did not intend to sell gas in interstate commerce *for resale.*

Thus, 15 U. S. C., Section 717f(c), would have no application to petitioner. By reason thereof shippers of gas, such as petitioner, are not required to have such a certificate, and failure to produce one is no reason to hold that petitioner could not state a cause of action for damages against respondent.

5. It is quite apparent that by its unlawful acts respondent violated the provisions of the Leasing Act, 30 U. S. C. A., Section 185, because it refused to operate and maintain its pipe-line as a common carrier; it violated Section 4 of the Natural Gas Act, 15 U. S. C. A., Section 717c, because that Act requires that all rates and charges demanded by a natural gas company in connection with the transportation of natural gas shall be just and reasonable and that any such rate or charge that is

not just and reasonable is unlawful and, of course, it has been adjudicated that the rates and charges that respondent demanded from June 21, 1938, and prior thereto, until April 2, 1949, were unreasonable and discriminatory, hence unlawful (*Montana-Dakota Utilities Co. v. Federal Power Commission,* 169 F. 2d 392 (C. A. 8)). Under the provisions of Section 22 of the Natural Gas Act, 15 U. S. C. A., Section 717u, the United States District Court was the proper place for petitioner to have brought an action to enforce said liability against respondent. Under Section 15 of the Antitrust Laws, 15 U. S. C. A., Section 15, petitioner was a person injured in its business and property by reason of respondent's conduct forbidden by the Antitrust Laws. The Federal Power Commission observed that respondent by its conduct had obtained an unlawful monopoly, for it said:

> "The evidence here shows beyond dispute that the effect produced by the establishment of such unit plans of development has been such that all the wells in the Bowdoin gas field (with a minor exception, unimportant to this discussion) and the Baker-Glendive field (with the exception of the Becker wells) are now owned by or under contract to the Respondent, and that the Respondent *as a result of the operation of the unit plans in both fields has acquired and presently exercises complete control of the production, transportation and sale of all natural gas produced from such fields, fixes the purchase price of all gas produced, and provides the exclusive market for all such gas.*" [R. 96.]

As alleged in the complaint respondent was able to get the unit plan as a result of its refusal to transport gas at a reasonable rate [R. 5, 6]. The conduct of respondent,

resulting in the monopoly, violated the provisions of the Antitrust Laws.

United States v. Trans-Missouri Freight Association, 166 U. S. 290;

In re American Fuel & Power Co., 122 F. 2d 223 (C. A. 6);

Bigelow v. R.K.O. Pictures, 327 U. S. 251.

Conclusion.

The petition for writ of certiorari should be granted so that it can be settled that common carrier pipe-line companies who violate the law and cause damage are liable therefor and that a person who is injured has a remedy.

Respectfully submitted,

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Counsel for Petitioners.

MILO V. OLSON,
LEIF ERICKSON,
JOHN J. MCKASY,
Of Counsel.

APPENDIX "A."

SECTION 28 OF THE LEASING ACT
30 U. S. C. A. 185.

RIGHTS-OF-WAY FOR PIPE LINES.

Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe-line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe-lines shall be constructed, operated and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe-line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided,* That the Government shall in express terms reserve and shall provide in every lease of oil lands under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe-line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe, operating a lease or purchasing gas or

oil under the provisions of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title: *Provided further,* That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. Feb. 25, 1920, c. 85, Sec. 28, 41 Stat. 449; Aug. 1, c. 599, Sec. 1, 49 Stat. 678.

NATURAL GAS ACT
15 U. S. C. A. 717.

Section 2, 15 U. S. C. A. 717a(6):

"Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4, 15 U. S. C. A. 717c(a):

All rates and charges made demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rates or charge that is not just and reasonable is hereby declared to be unlawful.

Section 4, 15 U. S. C. A. 717c(c):

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this chapter takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 7(c), 15 U. S. C. A. 717f(c):

No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extension thereof: * * *.

Section 22, 15 U. S. C. A. 717u:

The District Courts of the United States, the District Court of the United States for the District of Columbia and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce ay liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation if, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. June 21, 1938, c. 556, Sec. 22, 52 Stat. 833.

Pertinent Provisions of the Antitrust Laws 15 U. S. C.

Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

Section 2: *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to

monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3: Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the Court.

Section 4: The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; * * *.

Section 7: The word "person" or "persons" wherever used in sections 1-7 and 15 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Section 12: "Antitrust laws," as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27, inclusive, of this title. * * *.

Section 15: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

MINNESOTA STATUTES ANNOTATED

Section 541.05.

The following actions shall be commenced within six years:

(2) Upon a liability created by statute, other than those arising upon a penalty or forfeiture.

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HAROLD B. WILLEY, C

In the Supreme Court of the United States

October Term, 1953

No. 193

JOSEPH L. McCLELLAN, as Trustee in Bankruptcy of the Estate of CAPITAL GAS CORPORATION, a bankrupt corporation, CAPITAL GAS CORPORATION, a corporation, and JOHN WIGHT,

Petitioners,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,

Respondent.

BRIEF OF RESPONDENT, MONTANA-DAKOTA UTILITIES CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF OF RESPONDENT, MONTANA-DAKOTA UTILITIES CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reported in 204 F. 2d 166 and the opinion of the United States District Court of the District of Minnesota, Fourth Judicial Division (the trial court) is reported in 104 Fed. Supp. 46.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly affirmed the decision of the trial court that petitioner's cause of action to recover damages alleged to have been incurred from January 1, 1930, to January 1, 1940, was barred by the Statute of Limitations.

2. Whether the Court of Appeals properly affirmed the decision of the trial court that respondent's rate schedule filed with the Federal Power Commission was controlling, and that no court could predicate damages upon any rates except the filed rates.

3. Whether the Court of Appeals properly affirmed the decision of the trial court that primary jurisdiction was vested in the Secretary of the Interior to determine the amount of natural gas, if any, which petitioner could ship through respondent's pipelines, and petitioner had failed to exhaust its administrative remedy by obtaining from the Secretary of the Interior a determination of such matter.

STATUTES INVOLVED.

Minnesota Statutes Annotated, Section 541.05;
Natural Gas Act, Sec. 4(c) and (d), 15 U. S. C. at 717c (c) and (d);
Natural Gas Act, Sec. 5(a), 15 U. S. C. at 717d;
Mineral Leasing Act, Sec. 28, 30 U. S. C. at 185. (Prior to Amendment on August 12, 1953.)
S. 2220 of the 83rd Congress, 1st Session, approved August 12, 1953, amending Sec. 28 of the Mineral Leasing Act.

The above statutes are printed in the appendix to this brief, pages 9 to 11.

STATEMENT.

This action was instituted on October 25, 1950 (R. 1) to recover treble damages for alleged loss of profits and loss of lands during the period from January 1, 1930, to January 1, 1940, alleged to have been due to respondent's failure to transport natural gas for petitioner through its pipelines at reasonable rates. Respondent's pipelines are constructed upon rights of way obtained from the Secretary of the Interior under the Mineral Leasing Act and pursuant thereto were common carrier lines (R. 2). The Federal Power Commission acquired jurisdiction over petitioner's pipelines on the enactment of the Natural Gas Act on June 21, 1938, and on August 29, 1938 (R. 8), petitioner's rate schedules for the transportation of natural gas through its pipelines were filed with the Federal Power Commission pursuant to the requirements of the act. Those schedules remained on file unchanged until April 2, 1949, following the disposition of a proceeding instituted by another company (Montana Development Company) to which proceeding petitioner was not a party (R. 10, 11). Petitioner's claim for damages is predicated upon the contention that the filed rates were unreasonable and discriminatory (R. 11, 12).

Petitioner at no time made application to the Secretary of the Interior for a determination under Section 28 of the Mineral Leasing Act of the amount of gas which respondent should accept from petitioner for shipment through its lines (Supp. R. 23).

The trial court granted petitioner's motion for summary judgment for the following reasons.

(a) The filed rates were controlling and neither the court nor the Commission could make a retroactive determination of any other rate.

(b) Petitioner had failed to exhaust its administrative remedies by obtaining from the Secretary of the Interior an allocation of pipeline capacity.

(c) Petitioner's cause of action was barred by the Statute of Limitations.

The Court of Appeals in affirming the trial court discussed in its opinion only the Statute of Limitations but indicated that it concurred with the trial court on the other bases for its decision.

ARGUMENT.

I.

The Court of Appeals and the Trial Court Properly Held that Petitioner's Cause of Action Was Barred by the Statute of Limitations.

The applicable period of limitations was six years, *Minnesota Statutes Annotated,* Sec. 541.05. This action, commenced October, 1950, was to recover damages allegedly incurred during the period of January 1, 1930, to January 1, 1940. The court could do nothing for petitioner now, which it could not have done at any prior time. Therefore the case is barred.

Petitioner contends that the statute is tolled by a rate proceeding instituted by another shipper in 1941. That shipper could not obtain retroactive relief and its action did not affect the statute of limitations so far as petitioner is concerned. *A. J. Phillip Co. v. Grand Trunk Western Railway Company,* 236 U. S. 662.

II.

The Court of Appeals and the Trial Court Properly Held that the Filed Rate Was Controlling.

This court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, held that a rate schedule filed with the Federal Power Commission became the legal rate. The court said:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's order, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable" (pp. 251, 252).

Accepting the court's statement as the controlling rule of law, no court could permit damages to be recovered on the basis that rates other than the filed rates should be applied.

III.

The Court of Appeals and the Trial Court Properly Held that Petitioner Had Failed to Exhaust Its Administrative Remedies Under Sec. 28 of the Mineral Leasing Act.

This action was based upon the common carrier obligation placed upon respondent's pipelines under Sec. 28

of the Mineral Leasing Act (Title 30 U. S. C., Sec. 185). It was petitioner's contention that the lines were common carriers and that it had the right to recover damages merely upon the assumption that the filed rates were unreasonable.

Petitioner however had failed to establish its right to ship gas through respondent's pipelines under said Section 28, which act, prior to its amendment on August 12, 1953, provided that pipelines crossing government lands

> "shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from government land in the vicinity of the pipeline in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts determine to be reasonable."

No application for determination by the Secretary of the Interior of the amount of gas to be transported for petitioner was made (Supp. R. 23), and consequently no pipeline capacity was allocated to petitioner.

In a similar case, *Mondakota Gas Company v. Montana-Dakota Utilities Co.,* 103 Fed. Supp. 666 in which it appeared the plaintiff had failed to obtain a similar determination by the Secretary of the Interior, the court granted summary judgment on the ground among others, that plaintiff failed to exhaust its administrative remedies. Referring to the above requirement of Section 28 of the Mineral Leasing Act, the court said:

> "How could the plaintiff expect to establish his cause of action in a federal court if it failed to exhaust its administrative remedies and regulatory requirements to enable it to transact the business described in the complaint? Now the question is, does

it appear from the law and authorities cited that such would constitute an indispensable prerequisite to the commencement of an action for judicial relief such as is contemplated by this action? What if no space were found in the pipe lines to satisfy plaintiff's demands, or that defendant be called upon to alter or cancel contracts with others to accommodate plaintiff? Plaintiff suggests that the duty rested upon defendant to make such application to the Secretary, which at least is a partial admission that such a step should have been taken, but the plaintiff knew his own plans and what accommodations would be required from defendant, which information was not available to defendant, consequently in the court's view the duty rested upon plaintiff, as the party chiefly interested, to find out what, if any, space would be available for its use in defendant's pipe lines" (p. 669).

We submit that petitioner's position was fatally defective and that the courts below properly disposed of the case.

IV.

The Petition Fails to Establish Any Reason for Review by This Court.

Rule 38 of this court indicates the circumstances under which review by this court will be granted. This case wholly fails to show the existence of any such circumstances.

The decision of the court below is not in conflict with any decision of another court of appeals. The decision is not in conflict with any applicable local decision.

Petitioner apparently contends that the case involves an important question of federal law which should be decided by this court. On page 11 of its brief, petitioner asserts that the case is of first impression and is of

national import in that it affects all persons who desire to ship natural gas by common carrier pipeline. On this point, there is no public interest.

The common carrier requirement arose in 1920 out of the enactment of Section 28 of the Mineral Leasing Act. Indicative of the lack of public interest in it is the fact that on August 12, 1953, Section 28 of the Mineral Leasing Act was amended by S. 2220 so that the common carrier requirement is no longer applicable to regulated gas pipelines. There is therefore no public interest whatever in this matter.

CONCLUSION.

The decision of the Court of appeals was in every respect proper. This is not a case which for any reason requires review by this Court. For these reasons we respectfully submit that the petition for a Writ of Certiorari should be denied.

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Counsel for Respondent.

ARMIN M. JOHNSON,
RODGER L. NORDBYE,
Minneapolis, Minnesota,
Of Counsel.

APPENDIX.

MINNESOTA STATUTES ANNOTATED
§ 541.05

§ 541.05 Various cases, six years.

"The following actions shall be commenced within six years:

* * *

"(2) Upon a liability created by statute, other than those arising upon a penalty or forfeiture."

* * *

NATURAL GAS ACT
TITLE 15 U. S. C. § 717

Section 4(c) (Title 15 U. S. C. § 4, Title 15 U. S. C. § 717c(c)):

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 4(d) (Title U. S. C. § 717c(d)):

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except

after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

Section 5(a) (Title 15 U. S. C. § 717d(a)):

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *"

SECTION 28 MINERAL LEASING ACT
(Prior to amendment on August 12, 1953)

Title 30 U. S. C. § 185:

"Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by

the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable. * * *"

83rd CONGRESS 1st SESSION
S. 2220 Approved August 12, 1953

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 28 of the Act entitled 'An Act to promote the mining of coal, phosphate, oil shale, gas, and sodium on the public domain', approved February 25, 1920, as amended (30 U. S. C., sec. 185), is amended by inserting after 'Provided,' the following: 'That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: Provided further,'."

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IN THE

Supreme Court of the United States

October Term 1953.
No. 193

JOSEPH L. MCCLELLAN, as Trustee in Bankruptcy of the Estate of CAPITAL GAS CORPORATION, a bankrupt corporation, CAPITAL GAS CORPORATION, a corporation, and JOHN WIGHT,

Petitioners,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,

Respondent.

Petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

I.

Petitioner's Rights Could Not Be Lost While Awaiting Completion of the Administrative Process.

The principle that the Statute of Limitations will not be allowed "to commence to run against a right until that right has accrued in a shape to be effectually enforced" (*Borer v. Chapman,* 119 U. S. 587, 602) is not disputed by respondent's reply brief.

However, respondent urges that this principle is not applicable to the present case because "the Court could do nothing for petitioner now, which it could not have done at any other time." (Resp. Rep. Br. p. 4.)

Petitioner respectfully asserts to the contrary (Petition, p. 12)—that it had no cause of action until the Federal Power Commission had completed the administrative process of determining that respondent's filed rate was unreasonable. This process took more than seven years, from December 6, 1941, to April 2, 1949, following denial of certiorari by this Court on October 25, 1948, in *Montana-Dakota Utilities Co. v. Federal Power Commission,* 335 U. S. 853, reported below, 169 F. 2d 392.

This dispute is the pivotal one in this case. If the dispute is not resolved in favor of petitioner, it means that every common carrier natural gas pipeline company in the United States can hereafter, without fear of Sherman Act liability, evade its obligations to transport natural gas as a common carrier and obtain an unlawful monopoly on production, transportation and sale.

The Minnesota Statute of Limitations (six years) is much longer than that provided by most states for recovery on a statutory liability. However, even the Minnesota time period was not long enough to save the rights of petitioner if it is the law that its time to sue is running out while it must await the completion of the administrative process.

If petitioner had brought suit before the Federal Power Commission had reached a final decision it would have been properly told that its action was *premature.* (*Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U. S. 752, 767.)

But having awaited a final administrative determination, petitioner is now told that its action was brought *too late!*

Such a holding would be in conflict with *United States v. Louisiana,* 123 U. S. 32, 37, where it was held that a State's action in the United States Court of Claims to recover the proceeds of sales of swamp lands was not barred until the General Land Office had made an official and definite ascertainment of the amount due. This Court did not penalize Louisiana for the delays of the General Land Office, but the Eighth Circuit did penalize the petitioner for the delays of the Federal Power Commission (a delay brought about at least in part by respondent's exhaustion of its own remedies by a petition to this Court).

Respondent attempts to explain the paradox presented by the ruling below by citing at page 4 of its reply brief the decision in *A. J. Phillips Co. v. Grand Trunk Western Railway Co.,* 236 U. S. 662. The claim there was barred, however, because it was not filed on time with the Interstate Commerce Commission as required by the statute governing that particular Commission. In the present case there was no statutory machinery which either permitted or required petitioner to file a claim with the Federal Power Commission while it was waiting for a final decision from that body. Thus the *Phillips* case does not support the judgment of dismissal. On the other hand, the Supreme Court in that action recognized the principle relied on by petitioner (Petition, pp. 15-17) that even though petitioner was not a direct party to the Federal Power Commission proceeding, it was entitled to its benefit. In fact, the decision of the Eighth Circuit in the instant case is in conflict with the holding of this Court in the *Phillips* case.

II.

The Act of August 12, 1953, Demonstrates the National Importance of the Issues Involved in This Petition.

A swift succession of legislative events has followed the filing of the petition herein on July 22, 1953.

Senate Bill 2220, amending Section 28 of the Mineral Leasing Act (30 U. S. C. 185) was passed on July 27, 1953, by the House of Representatives (99 Cong. Record 10144) and after adoption of a conference report (H. Report No. 1032, p. 10635) on July 30, 1953 (p. 10785) the bill was sent to the President and signed on August 12, 1953.

Respondent now urges this Court (Resp. Br. p. 8) to take this new legislation into consideration and to deny this petition on the ground that because of the new law, "there is therefore no public interest whatever in this matter."

It is submitted that the legislative history of the bill should produce an exactly contrary impression on the mind of this Court.

According to Senator Butler, the author of S. 2220:

> "The purpose of the bill is simply to clarify the system of Federal regulation of gas pipelines. Under present law, gas pipelines are subject to Federal regulation from two different sources—from the Department of the Interior and the Federal Power Commission. This bill proposes to repeal certain regulatory authority of the Department of the Interior over gas pipelines crossing public lands so as to leave all Federal regulatory authority over such pipelines in the hands of the Federal Power Commission where it belongs." (99 Cong. Rec. 9289.)

The exact situation of this petitioner was in the mind of the Senate when it passed the measure. The following excerpt from the debate is found at 99 Congressional Record 9289:

> "Mr. Long: Generally speaking, it seems to me that, looking not to the immediate problem but to the long-run problem, *it is better that most of the pipelines should operate as common carriers in order that every producer of gas, whether he be a small independent producer or whether he be a large producer, would have an equal opportunity to transport his gas in interstate commerce,* or to any destination he might choose.
>
> Mr. Anderson: I agree with the Senator from Louisiana. I think that would be desirable, and *that is what we are trying to bring about by means of this proposed legislation."* (Emphasis supplied.)

The House of Representatives adopted a clarifying amendment which was offered by Representative McCormack with the following explanation:

> "Mr. McCormack: * * * The second portion of the proposed amendment relates to producers who are not on public lands and would give the Federal Power Commission authority to direct pipeline companies under Natural Gas Act jurisdiction to accept their gas with due consideration as to whether or not they have the available capacity to do so. *It is designed to protect the small, independent producer from being at the mercy of the pipeline company.* At any particular time, the small, independent producer might not be adversely affected by the lack of transport capacity. If that were the case, however, he simply need not make application to the Federal Power Commission. Although it cannot be said that

there would be an immediate rush to the Power Commission for part of the capacity of existing pipelines, the amendment looks to the future and simply adds a safeguard *in the public interest.*" (Emphasis supplied.) (99 Cong. Rec. 10143.)

However, this amendment was omitted from the final draft of the bill, the following explanation being given:

"Mr. Miller of Nebraska: Mr. Speaker, when the bill was before the House the gentleman from Massachusetts (Mr. McCormack) offered an amendment which was agreed to by the committee. The amendment was taken out in the conference report. *The committee has agreed to study the matter carefully and, if it needs further correction, will take up the suggestions offered by the gentleman from Massachusetts in the next session.*" (Emphasis supplied.) (99 Cong. Rec. 10785.)

In any event it is very doubtful that the repeal of the common carrier provision of the Leasing Act could operate retroactively so as to eliminate the common carrier status of existing (including respondent) common carrier natural gas pipelines who obtained their right-of-ways across public land upon the express statutory condition and also upon the written agreement with the Secretary of the Interior that such lines should be operated and maintained as common carriers. Independent gas producers and the public generally acquired vested rights thereby that cannot be destroyed by such legislative action.

United States Constitution, Fifth Amendment;

United States Constitution, Article I, Section 10.

It is a well recognized constitutional principle that, "In so far as affecting vested rights, a statute will be construed as prospective only."

Chew Heong v. United States, 112 U. S. 536;

U. S. F. & G. Co. v. U. S. use of S. W. Co., 209 U. S. 306, 314;

82 C. J. S. 994.

Congress undoubtedly has the power to change the procedure and require existing common carrier natural gas pipelines to be regulated solely by the Federal Power Commission under the Natural Gas Act and eliminate any other regulation by the Department of the Interior. That would be merely a procedural change that would not affect the substantive rights.

In re Inland Dredging Corp., Globe Indemnity Co. (C. C. A. 2d), 61 F. 2d 765, cert. den., 288 U. S. 611.

It would certainly be contrary to all constitutional concepts if over night the legislature could eliminate the common carrier liability of the natural gas pipelines, thus destroying the public's vested interest in the continuation of that service. For example, the legislature cannot do the reverse, that is, grant a right-of-way to a railroad and then after the railroad has fulfilled the conditions of the grant, the railroad completed, the State then has no power to resume the lands. So held in *State of Minnesota v. Duluth and I. R. R. Co.,* 97 Fed. 353, 359, 360, C. C. Minnesota 1899.

As shown by the above excerpts from the Congressional record, it was the expressed intent to change the procedure

regulating common carrier pipelines, not to change their status. Although respondent urges that the public interest has been chloroformed (Resp. Br. p. 8), petitioner submits that the public interest in the common carrier gas pipeline is still very much alive.

Out of all this recent legislative activity, and contrary to contentions of the respondent, it is respectfully submitted that only one conclusion can be drawn, to-wit, that there presently exists a great public interest, not only in having competition in the sale of gas, but also in the protection of the rights of those producers who desire to ship natural gas over a common carrier gas pipeline under reasonable rates fixed by the Federal Power Commission.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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